

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.8003 OF 2013

1. Venubai Valuji Talekar (Awari),
Age : 81 years, Occu. Household
and Agriculturist,
R/o Vidyanagar, Sangamner,
Dist. Ahmednagar
 2. Anita Rajendra Borkar,
Age : 37 years, Occu. Household,
R/o Vidyanagar, Sangamner,
Dist. Ahmednagar
 3. Indubai Baburao Dhule,
Age : 77 years, Occu. Agriculturist,
R/o Vidyanagar, Sangamner,
Dist. Ahmednagar
 4. Bhikaji Naguji Nirhali,
Age : 82 years, Occu. Nil,
R/o Vidyanagar, Sangamner,
Dist. Ahmednagar
- ..PETITIONERS

VERSUS

1. Ranjana Ramesh Nisal,
Age : 57 years, Occu. Household,
R/o Vidyanagar, Sangamner,
Dist. Ahmednagar
 2. Ramesh Shankar Nisal,
Age : 60 years, Occu. Retired,
R/o Vidyanagar, Sangamner,
Dist. Ahmednagar
 3. Prakash Sopan Pawase,
Age : 45 years, Occu. Service,
R/o Vidyanagar, Sangamner,
Dist. Ahmednagar
- ..RESPONDENTS

Mr Anil S. Bajaj, Advocate for petitioners;
Mr A.P. Bhandari, Advocate for respondents

CORAM : N.W. SAMBRE, J.

**(Date of reserving the
judgment : 23rd February, 2015**

**Date of pronouncing the
judgment : 25th February, 2015)**

JUDGMENT

Rule. Rule made returnable forthwith and by consent, the matter is heard finally.

2. By the present writ petition under Article 227 of the Constitution of India, the petitioners/original plaintiffs seek to challenge the order dated 23rd July, 2013, passed by Civil Judge Junior Division, Sangamner, below Exh.41, in Regular Civil Suit No.401 of 2010, whereby their prayer for appointment of Court Commissioner came to be turned down.

3. The petitioners/plaintiffs have filed Regular Civil Suit No.401 of 2010 against respondents/defendants for declaration of easementary right in relation to the suit property mentioned in plaint paragraph 2-B and as demonstrated in map (annexure – A) thereto. The petitioners have also prayed for perpetual injunction against the respondents restraining them from interfering with the possession and peaceful enjoyment of the suit

property mentioned in paragraph 2-B of the plaint.

4. The suit has reached the stage of recording of evidence and the same has prompted the petitioners herein to move an application Exh.41 for appointment of Court Commissioner.

5. In application Exh.41, the petitioners have urged the Court that, in exercise of powers under Order XXVI, Rule 9 of the Code of Civil Procedure, Court Commissioner be appointed to carry out measurement of their property and that of the lane which is the subject-matter of the suit. It is also mentioned in Exh.41 that the Court Commissioner should also ensure the location of the doors and windows of the houses of the petitioners and respondents, the location of water connection and sewerage, by drawing appropriate map.

6. The application Exh.41 was resisted by the respondents/defendants by filing their reply at Exh.43 wherein they have urged that what is claimed in the suit is easementary right, which is required to be established strictly as per the provisions of the Indian Evidence Act. According to the respondents, in view of the same, it is not open for the petitioners to take recourse to the appointment of Court Commissioner and collect the evidence. It is submitted on behalf of the respondents that the Trial Court has rightly rejected the application Exh.41.

7. Mr Bajaj, learned Counsel appearing on behalf of the petitioners has placed reliance on the judgment of this Court in the matter of **Yesabrao s/o Rangrao Lokhande vs. Maroti s/o Late Nagan Bitewar**, reported in **2004 (1) ALL MR 909**, so as to canvass that the discretion vested with the Trial Court to order local investigation/inspection is not with an object to collect the evidence but to obtain evidence which, from its peculiar nature, can only be had on the spot and which in fact, will be in aid of the material available with the Court for arriving at a proper decision. He also submits that cases of boundary disputes and disputes about identity of lands, are the few instances which are considered by the Court, in the said case, however, the judgment cannot be restricted only to those instances but can be extended even to the claim pleaded in the present case. In addition to above, he has also placed reliance on the judgment of this Court in the matter of **Habibkhan s/o Inauttalakhan & ors. vs. Waman s/o Govind Rathod & ors.**, reported in **2012 (1) ALL MR 803**, so as to canvass that in each and every case it cannot be said that the Commissioner appointed by the Court invoking power under section 75 read with Order XXVI, Rule 9 of the Code of Civil Procedure, is for collecting the evidence. According to him, the present one is a fit case wherein the Trial Court should have ordered appointment of Court Commissioner.

8. Mr Bhandari, learned Counsel appearing on behalf of the respondents/defendants has placed reliance on the judgments of this Court in the matter of **Pandurang Nandlal Chandak & anr. vs. Sandip Mukundrao Pensalwar & anr.**, reported in **2009 (2) Mh.L.J. 487** and **Nalubai Narayan Shinde & ors. vs. Gopinath Dagdu Shinde**, reported in **2011 (3) Bom. C.R. 167**, so as to canvass that if the intention of appointment of Court Commissioner is to make local investigation and collect the evidence, the same is not permissible. He has placed reliance on the observations made in paragraph 7 of the said judgment so as to canvass that the Trial Court which is vested with the discretion to pass appropriate orders on such application, having exercised such discretion, does not call for any interference in writ jurisdiction.

9. Having considered rival contentions of the parties and on perusal of the dimensions of the properties purchased by the petitioners along with their boundaries if are verified with that of the plaint map and the relief claimed in relation to the properties mentioned in paragraph 2-B of the plaint, it is required to be noted that a *prima facie* case is made out by the petitioners herein, in relation to the appointment of Court Commissioner. It is required to be noted that the claim in the plaint is in relation to grant of easementary right. Though the said easementary right can also be established by examining independent witnesses, it is required to be noted

that the petitioners are the neighbours and they will be entering into witness box in support of petitioners' claim. However, the said evidence on behalf of the petitioners will not preclude them from exercising the right of appointment of Court Commissioner, particularly under Order XXVI, Rule 9 of the Code of Civil Procedure as the petitioners, in clear terms, have come out with a case in the suit, that they are entitled for enjoyment of suit property which right was sought to be interrupted by the respondents. The respondents, by denying the claim of the petitioners, have asserted that there exists no lane as is claimed by the petitioners and neither any water connection nor the sewerage flow arrangements are in the said lane. Rather, the respondents claim that the said lane is their private property. In addition to above, it is also claimed by the petitioners that the doors and windows of their house open in the said lane. Once such an assertion is brought on record, which is sought to be justified by the sale deeds and is denied in toto by the respondents, in my opinion, this is a fit case for ordering appointment of Court Commissioner in exercise of powers under Order XXVI, Rule 9 of the Code of Civil Procedure, who will act in aid of the Court in bringing the evidence for arriving at an appropriate decision on the issue raised in the suit.

10. It is required to be noted that the appointment of Court Commissioner, in the present case, will not be amounting to collection of evidence at the behest of the petitioners as the case, as is sought to be

pleaded and canvassed before the learned Trial Court from the day one, is in relation to the suit property and in support thereof they have already placed on record the independent evidence. What is required to be done by the Court Commissioner is to verify the claim, having regard to the claim made in the plaint and to submit his report, which of course, would be subject to the scrutiny by the Trial Court.

11. In the light of foregoing discussion, in my opinion, learned Counsel appearing on behalf of the petitioners has rightly placed reliance on the judgments of this Court in the matter of Yesabrao Lokhande and Habibkhan (cited supra).

12. The reliance placed by the learned Counsel appearing on behalf of the respondents on the judgments of this Court in the matter of Pandurang Chandak and Nalubai Shinde (cited supra), in the light of above observations that the appointment of Court Commissioner not amounting to collection of evidence, has hardly any application to the facts of the instant case.

13. In the light of what has been stated above, in my opinion, the application Exh.41 deserves to be allowed. In the result, I pass following order :-

The order dated 23rd July, 2013, passed by Civil Judge Junior Division, Sangamner, below Exh.41, in Regular Civil Suit No.401 of 2010, is quashed and set aside.

The application Exh.41 filed by the petitioners stands allowed.

The Trial Court is directed to pass a consequential order of appointment of appropriate person/authority as Court Commissioner as is prayed by the petitioners herein, i.e. any Advocate, Architect or Civil Engineer, etc. having regard to the facts and circumstances of the present case.

Writ Petition stands allowed in above terms.

Rule made absolute accordingly with no order as to costs.

(N.W. SAMBRE, J.)

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